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No. 85-2031

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

SOL C. SCHWARTZ AND RAYMOND F. LANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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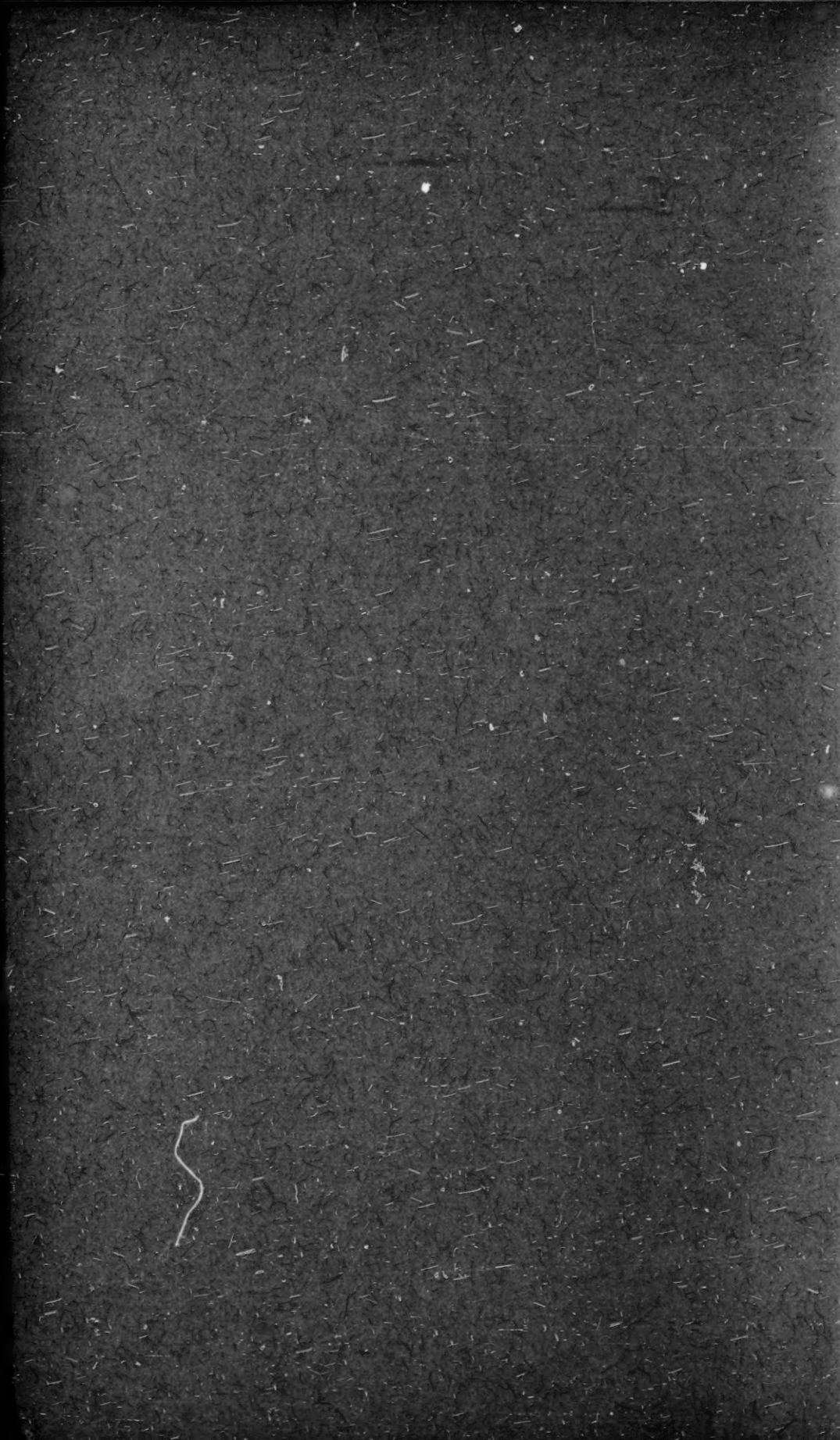

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1. The district court entered judgment for the defendants in this case because of what it described as a "fatal variance" between the indictment and the proof at trial (Pet. App. 30a). The court of appeals noted that the cases supporting this conclusion were "based on the Fifth Amendment's grand jury guarantee" (Pet. App. 7a). The only factual question resolved by the district court was whether the government had shown a scheme to defraud that was as broad as the one charged in the indictment—not whether the government had shown a scheme to defraud. Nonetheless, the court of appeals dismissed the government's appeal as barred by the Double Jeopardy Clause on the theory that the district court's action amounted to a finding that the evidence was insufficient to support a conviction.

Respondent Lane contends that the analysis of the court of appeals was correct. He argues (Lane Br. in Opp. 3-4) that the district court found that the government failed to

prove "some or all of the factual elements of the offense charged" (*United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)) when it found that the evidence was insufficient with respect to four of the six alleged victims of respondents' fraudulent scheme. As we showed in our petition, however, the necessary "element" of wire fraud is the existence of a fraudulent scheme, not the existence of the precise scheme alleged in the indictment. When it held in earlier decisions that the government must prove every object of the scheme alleged in the indictment, the Ninth Circuit carefully explained that it was not expanding the "elements" of the offense of wire fraud but was imposing a requirement based on its reading of the Grand Jury Clause (see Pet. 9 n.9).

Respondent Schwartz, in similar fashion, argues that the district court treated the existence of a unitary scheme with six victims as an "essential" fact, and that an error as to what facts are essential does not affect the factual nature of the judgment (Schwartz Br. in Opp. 5-6). But this is not a case like *Smalis* v. *Pennsylvania*, No. 85-227 (May 5, 1986), where the trial court misunderstood the elements of the offense of third-degree murder and was led by that misunderstanding to hold that the proof did not show that the defendants had committed the offense.[1] This is a case in which the court held that a "fatal variance" and the protections of the Grand Jury Clause precluded a conviction under an indictment drafted in a particular way, *whether or not* the proof showed that respondents were factually guilty of committing wire fraud and conspiracy as the court understood those crimes.

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[1]Likewise, this case is not like *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), where the trial court misunderstood the meaning of the statutory aggravating circumstance that a murder was committed "as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value" and was led by that misunderstanding to hold that the proof did not support a finding of that aggravating circumstance.

Respondent Schwartz acknowledges that the district court's ruling rests not on any determination that the government had failed to prove the statutory elements of wire fraud and conspiracy, but instead on "cases construing the Constitution so as to create further requirements as to the proof sufficient for conviction of the offense charged" (Schwartz Br. in Opp. 8). Under this Court's precedents, that distinction is crucial. As this Court observed in *United States* v. *Scott*, 437 U.S. 82, 98 n.11 (1978), "a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word." The Double Jeopardy Clause does not bar retrial "where the defendant * * * obtains the termination of the proceedings against him in the trial court without any finding by a court or jury as to his guilt or innocence. He has not been 'deprived' of his valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Id.* at 100 (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)).

2. Respondents contend (Schwartz Br. in Opp. 6-7; Lane Br. in Opp. 4-6) that this case is controlled by *Sanabria* v. *United States*, 437 U.S. 54 (1978). But there is only a superficial similarity between Sanabria's "acquittal" on the nonessential averment that he was connected with horse betting and respondents' "acquittal" on the nonessential averments in this case. The trial court in *Sanabria* refused to admit the evidence connecting Sanabria with numbers betting and then found a lack of evidence connecting him with horse betting. This Court held that "the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence" (437 U.S. at 68-69 (footnote omitted))—a description that cannot be fitted to this case.

The *Sanabria* Court also assumed for the sake of argument that "the District Court 'dismissed' the numbers allegation" (437 U.S. at 69). Once that allegation was dismissed, the indictment still contained an averment that Sanabria was "connected with" an illegal gambling business engaged in horse betting, and that averment was sufficient to charge a violation of 18 U.S.C. 1955. But the district court then reached a factual determination that Sanabria was not "connected with" the illegal gambling business that was still alleged in the indictment. The ultimate determination that Sanabria was not "connected with" the illegal gambling business was factual, even though it was affected by an erroneous legal ruling along the way that had narrowed the indictment. See 437 U.S. at 70-73.

This case would be comparable to *Sanabria* if the district court had first, for some reason, deleted from the indictment (or excluded evidence on) the charges of defrauding the two Local 28 Oakland benefit plans, and had then reached a factual determination that respondents were not guilty of the scheme to defraud the four other benefit plans that were left in the indictment. But the district court did just the opposite: it resolved the factual questions concerning the other four benefit plans first and then reached a legal conclusion that the allegations concerning the Local 28 benefit plans must be dismissed, whether or not the facts proved at trial supported those allegations. Although the district court resolved some of the factual allegations supporting the scheme to defraud, its ultimate termination of the trial was based on a purely legal consideration: the Grand Jury Clause rule established by the Ninth Circuit's decision in *United States* v. *Miller*, 715 F.2d 1360 (1983), modified, 728 F.2d 1269 (1984), rev'd, No. 83-1750 (Apr. 1, 1985).

3. Respondents are unsuccessful in their attempts (Schwartz Br. in Opp. 13; Lane Br. in Opp. 7) to show that the decision below does not conflict with *United States* v. *Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, No. 84-1419 (June 17, 1985). In *Maker*, as in this case, the district court granted judgment for defendants after the jury had been empaneled and the presentation of testimony had begun. It is true that the district court in *Maker* acted before the government had finished presenting its case in chief, and it is also true that the court did not denominate its ruling a "judgment of acquittal." But neither fact distinguishes *Maker* from this case. Respondents point to no opinion of this Court or any court of appeals that treats one type of midtrial dismissal differently from another based on how much of its case the government was allowed to put on; and, as the cases cited in our petition make clear (Pet. 8 n.8), it is the substance of a trial court's action, not its label, that determines the double jeopardy consequences.

The key question is whether the "essential character" (*Scott*, 437 U.S. at 98) of the district court's ruling was factual or legal. In *Maker*, the court of appeals held that the essential character of a midtrial judgment for defendants was legal when it was based on a determination that "a single scheme conviction requires proof that the defendant had planned the scheme in its major details before any aspect of the scheme is implemented" (751 F.2d at 623). In this case, the court of appeals held that the essential character of a midtrial judgment for defendants was factual when it was based on a determination that a "unitary scheme" conviction requires proof that the details of the scheme (including the identity of the victims) were identical to those alleged in the indictment. Those two holdings are in conflict.

Respondent Schwartz virtually concedes the existence of a conflict by suggesting that certiorari should not be granted because *Maker* is "at odds with this Court's decisions" (Schwartz Br. in Opp. 13). For reasons already elaborated, we believe that the decision below was incorrect and that, correspondingly, the decision in *Maker* was correct. In any case, it is plain that the lower courts have been unable to agree on the implications of this Court's decisions, and review by this Court is appropriate to clear up the confusion.

4. Respondent Lane suggests (Lane Br. in Opp. 4 n.6, 8) that certiorari should be denied because this case does not present an issue that is likely to recur. But the logic of the decision below would suggest that a district court's entry of judgment for defendants raises a double jeopardy bar whenever the trial court examines the facts for any purpose.[2] Among other things, that logic would preclude a government appeal or retrial any time that a trial court finds a fatal variance between the indictment and the proof at trial, no matter how strongly the facts proved at trial show that the defendant is guilty of a criminal offense (and no matter how erroneous the ruling of the trial court). Thus, the ruling below portends sweeping consequences that deserve the attention of this Court.

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[2]Indeed, respondent Schwartz advances the radical proposition that, "where a district court has terminated a trial favorably to the defendants based on findings as to the sufficiency of evidence, scrutiny of the reasoning underlying the findings is irrelevant and impermissible for double jeopardy analysis"—even when there is no hint of factual innocence in the district court's findings (Schwartz Br. in Opp. 9).

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

AUGUST 1986